No.

482

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 18 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 482

BURGESS-NORTON MFG. CO.,
Appellant,

vs.

RICHARD J. LYONS, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

JURISDICTIONAL STATEMENT.

E. H. McDERMOTT,
RICHARD S. OLDBERG,
LEONARD S. SCHMITZ,
HAMILTON SMITH,
111 West Monroe Street,
Chicago 3, Illinois,
Attorneys for Appellant.

Dated: September ....., 1957.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement of the Case	4
(a) The Facts Disclosed by the Pleadings	4
(b) Synopsis of Statutory Provisions and Their Effect	5
(c) Time, Manner and Method by Which Questions Sought To Be Reviewed Were Raised and Considered	9
The Questions Are Substantial	13
(a) The Jurisdictional Authorities Sustain This Court's Jurisdiction	13
(b) The Equal Protection Issues Are Substantial	14
(c) The Due Process Issue Is Substantial	21
Conclusion	24
Appendix:	
Appendix A: Judgment of the Illinois Supreme Court	25
Appendix B: Opinion of the Illinois Supreme Court in This Cause	27
Appendix C: First Opinion of the Illinois Supreme Court in Turner v. Wright	28
Appendix D: Second Opinion of the Illinois Supreme Court in Turner v. Wright, Together With the Dissenting Opinion	40
Appendix E: Illinois Use Tax Act	57

Citations.

Cases.

Allen v. Louisiana, 103 U. S. 80 14
Asbury Hospital v. Cass County, 326 U. S. 207, 214 16
Babcock v. Nudelman, 367 Ill. 626, 12 N. E. 2d 635 6
Bowe v. Scott, 233 U. S. 658, 662 ..... 2, 13
Green v. Frazier, 253 U. S. 233, 238 22
Gregg Dyeing Co. v. Query, 286 U. . 472 18
Hart Refineries v. Harmon, 278 U. S. 499, 502 16
Henneford v. Silas Mason Co., 300 U. S. 577 ..... 7, 18
Home Ins. Co. v. Dick, 281 U. S. 397, 407 ..... 2, 13
Ingersoll v. Dept. of Revenue, 405 Ill. 367, 90 N. E. 2d 747 6
Krebs v. Thompson, 387 Ill. 471, 476, 56 N. E. 2d 761, 764 5
Loan Association v. Topeka, 87 U. S. (20 Wall.) 655 23
Madden v. Kentucky, 309 U. S. 83, 86-87 14
McCollum v. Board of Education, 333 U. S. 203, 206 .. 2, 13
Parkersburg v. Brown, 106 U. S. 487 22
People's Drug Shop, Inc. v. Moysey, 384 Ill. 283, 51 N. E. 2d 144 5
Rapid Transit Corp. v. New York, 303 U. S. 573, 578, 579 16
Schlemmer v. Buffalo, Rochester And Pittsburg Ry. Co., 205 U. S. 1, 11 ..... 2, 13
Smith v. Cahoon, 283 U. S. 553 15
Southern Ry. Co. v. Clift, 260 U. S. 316, 319 ..... 2, 14
Stewart & Co. v. Sadrakula, 309 U. S. 94, 97 ..... 2, 13
Svithiod Singing Club v. McKibbin, 381 Ill. 194, 205, 44 N. E. 2d 904, 910 ..... 5, 6

Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 75 ..... 21, 22
Welch v. Henry, 305 U. S. 134, 144 16
Wheeling Steel Corp. v. Glander, 337 U. S. 562 18
Winter v. Barrett, 352 Ill. 441, 186 N. E. 113 14

Constitution and Statutes.

Constitution of the United States:
Article I, Section 8 7
Amendment XIV, Section 1 ..... 3, 4
Constitution of Illinois, Smith-Hurd Ill. Anno. Stat., Vol. "Constitution":
Article IX, Section 1 ..... 2, 11
Article IX, Section 7 11
Illinois Retailers Occupation Tax Act, Ill. Rev. Stat., 1955, Ch. 120, § 440, et seq.:
§ 440 6
§ 441a 6
§ 445 21
§ 451 6
Illinois Use Tax Act, Laws of Illinois, pp. 2027-2037; Ill. Rev. Stat., 1955, Ch. 120, §§ 439.1-439.18:
Section 2 7
Section 3 ..... 7, 8
Section 6 8
Section 9 ..... 8, 9
Section 10 ..... 8, 9
Illinois Civil Practice Act, Ill. Rev. Stat., 1955, Ch. 110:
Section 57.1 2
Illinois Supreme Court Rules, Ill. Rev. Stat., 1955, Ch. 110:
Section 101.36(2)(a) 13
Section 101.44(1) 14

Ill. Rev. Stat., 1955, Ch. 37, § 72.26 2
Ill. Rev. Stat., 1955, Ch. 127, §§ 172 and 172a 2
28 U. S. C. § 1257(2) 2

Miscellaneous.

Nichols Illinois Civil Practice, Vol. 2, p. 394, § 1419 .. 5
Rules of the Illinois Department of Revenue, CCH. Ill. State Tax Rep.:
¶ 60-106 6
¶ 60-120 7
¶ 60-126 7
¶ 60-128 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

BURGESS-NORTON MFG. CO.,

Appellant,

vs.

RICHARD J. LYONS, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

JURISDICTIONAL STATEMENT.

Burgess-Norton Mfg. Co. submits this jurisdictional statement pursuant to Rules 15 and paragraph 2 of Rule 13 of the Revised Rules of the Supreme Court of the United States.

OPINIONS BELOW.

The opinion of the Illinois Supreme Court, holding the Illinois Use Tax Act constitutional, is set forth in Appendix B hereto and reported in 11 Ill. 2d at page 294. The opinion stated that the questions raised nad been determined at the March, 1957 term of the Illinois Supreme Court in *Turner* v. *Wright*. The opinion referred to, in *Turner* v. *Wright*, set out in Appendix D hereto, is reported in 11 Ill. 2d at page 161 and 142 N. E. 2d at page 84. One judge filed

a dissenting opinion which is also set out in Appendix D and reported with the majority opinion. These opinions were promulgated after a rehearing had been granted in *Turner* v. *Wright*. The original opinion which held the act unconstitutional without dissent, on the ground that it violated the requirement of Article IX, Section 1[1] of the Illinois Constitution that all privilege taxes must be uniform as to the class upon which they operate, is set forth in Appendix C hereto, but is not reported.

JURISDICTION.

Plaintiff-appellant instituted suit in the Circuit Court of Sangamon County for a declaratory judgment pursuant to Ill. Rev. Stat., 1955, Ch. 110, § 57.1, and injunctive relief pursuant to Ill. Rev. Stat., 1955, Ch. 127, §§ 172 and 172a, and Ch. 37, § 72.26.

The judgment of the Illinois Supreme Court, the review of which is hereby sought, was dated May 23, 1957, and entered on that date. A copy of that judgment is apppended hereto as Appendix A. No petition for rehearing was filed.

A notice of appeal to this Court was filed with the clerk of the Illinois Supreme Court on August 20, 1957.

This Court has jurisdiction to entertain this appeal by reason of 28 U. S. C. § 1257(2).

The following cases sustain the jurisdiction of this Court to entertain this appeal: *McCollum* v. *Board of Education*, 333 U. S. 203, 206; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 97; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407; *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 319; *Bowe* v. *Scott*, 233 U. S. 658, 662; *Schlemmer* v. *Buffalo, Rochester And Pittsburg Ry. Co.*, 205 U. S. 1, 11.

---

1. Smith-Hurd Ill. Anno. Stat., Vol. "Constitution", p. 708.

STATUTE INVOLVED.

This appeal questions the constitutionality of the Illinois Use Tax Act. That act may be found in Laws of Illinois, 1955, pp. 2027-2037, and is set forth in full in Appendix E hereto. That part of the act which does not amend Section 4 of the Uniform Motor Vehicle Anti-Theft Act may also be found in Ill. Rev. Stat., 1955, Ch. 120, §§ 439.1-439.18. (The act was amended in 1957 without effecting changes material to the questions here involved. The act, as amended, is printed in C. C. H. Illinois State Tax Reporter, ¶ 94,810 *et seq.)*

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

(1) Whether the Illinois Use Tax Act denies equal protection of the laws in violation of Section 1 of Amendment XIV to the Constitution of the United States by:

(a) taxing the use of property purchased from persons engaged in the occupation of making retail sales, but not taxing identical uses of identical or substantially identical property purchased from persons not engaged in the occupation of making retail sales:

(b) providing for a tax refund, when property purchased is returned by the purchaser to his seller, in the case of taxpayers who remit the tax to their sellers, but not in the case of taxpayers who remit the tax directly to the Illinois Department of Revenue instead of paying it to their sellers.

(2) Whether the Illinois Use Tax Act, in permitting a retailer to retain the use tax which he has collected from a purchaser, in connection with the sale of tangible personal property, to the extent that he is required to remit and does remit the tax imposed by the Illinois Retailers'

Occupation Tax Act with respect to the sale of the same property, provides for the gift of public funds for a private purpose and permits the taking of private property without due process of law in violation of Section 1 of Amendment XIV to the Constitution of the United States.

STATEMENT OF THE CASE.

(a) The Facts Disclosed by the Pleadings.

Plaintiff below, appellant here, filed a sworn intervening petition,[2] in the nature of a complaint, in the Circuit Court of Sangamon County, Illinois. That petition alleged, *inter alia*, the following:

Plaintiff is an Illinois corporation, maintaining its principal offices and place of business in the State of Illinois. It is engaged in the manufacturing business. Defendant Richard J. Lyons was Director of the Department of Revenue of the State of Illinois and Warren E. Wright State Treasurer.

During the month of September, 1955, plaintiff purchased tangible personal property from retailers for use and not for resale for the total sum of $22,013.19. Some of the retailers, from whom these purchases were made, had registered under the Illinois Retailers' Occupation Tax Act or had obtained a certificate of authority under the Use Tax Act; others had done neither.

Plaintiff filed a return with the Illinois Department of Revenue, and paid under protest the use tax upon all of its purchases for use from retailers during the month of September, 1955. This payment amounted to $550.37.

The petition also specified the particulars in which it was claimed that the Illinois Use Tax Act is unconstitutional.

A writ of injunction[3] was issued by the Circuit Court of

2. R. 3-34.
3. R. 38.

Sangamon County, Illinois, restraining defendant Wright from transferring out of the protest fund the $550.37 which plaintiff had paid into it. Thereafter, the defendants filed a motion[4] to dissolve the injunction and to dismiss plaintiff's "complaint", said motion asserting that the Illinois Use Tax Act is constitutional. No other defensive pleading was filed by defendants. By such motion the defendants admitted the foregoing allegations of fact contained in plaintiff's intervening petition.[5]

The motion of defendants was granted,[6] the Circuit Court having determined that the Illinois Use Tax Act was constitutional. Plaintiff then perfected an appeal directly to the Illinois Supreme Court.

(b) Synopsis of Statutory Provisions and Their Effect.

Before analyzing the provisions of the Illinois Use Tax Act it is necessary first to consider the Illinois Retailers' Occupation Tax Act.[7] That act, in effect since 1933, imposes a tax upon persons engaged in the business of selling tangible personal property at retail. The tax is exacted at the rate of 2½% of the gross receipts from retail sales made in the course of such business. That act does not obligate retailers to pass the tax on to their sellers.[8] The tax is on the retailer, and he is required to remit the tax to the Department of Revenue.

---

4. R. 39-41.

5. *Krebs* v. *Thompson*, 387 Ill. 471, 476, 56 N. E. 2d 761, 764; *Swithiod Singing Club* v. *McKibbin*, 381 Ill. 194, 205, 44 N. E. 2d 904, 910; *Nichols Illinois Civil Practice*, Vol. 2, p. 394, § 1419.

6. R. 51-53.

7. Ill. Rev. Stat., 1955, Ch. 120, § 440 *et seq.*, (The act was amended in 1957 without effecting changes material to the questions here involved; see C. C. H. Ill. State Tax Rep., ¶ 94-633, *et seq.*, for the amended act).

8. *People's Drug Shop Inc.* v. *Moysey*, 384 Ill. 283, 51 N. E. 2d 144.

Section 1[9] of the act so defines the term "gross receipts" that amounts allowed as credit for property taken in trade are excluded from gross receipts, and no tax is thus imposed upon the value of such trade-ins. Section 2a[10] of the act requires all persons engaged in the business of selling tangible personal property at retail in Illinois to obtain a Certificate of Registration from the Department of Revenue.

The tax is an occupation tax, not a sales tax. Only persons who are actually engaged in the business of selling tangible personal property at retail are taxed by the act. Thus, by Section 1[11] of the act, the isolated or occasional sale of tangible personal property by one who does not habitually engage in the business of making retail sales is not taxable. By court decision, numerous persons who make retail sales but who are deemed to be engaged primarily in the business of performing a service rather than the business of retail selling have been held not subject to the tax. These persons include clubs selling food and drink to its members;[12] optometrists and opticians selling eyeglasses;[13] manufacturers selling made-to-order machine tools.[14]

By rules promulgated by the Illinois Department of Revenue under the authority of Section 12[15] of the Retailers' Occupation Tax Act, similar distinctions are made. Thus, by way of example, by Rule 3,[16] the sale of machines, tools,

9. *Supra*, n. 7, §440.
10. ibid., § 441a.
11. ibid., § 440.
12. *Svithiod Singing Club* v. *McKibbin*; 381 Ill. 194, 44 N. E. 2d 904.
13. *Babcock* v. *Nudelman*, 367 Ill. 626, 12 N. E. 2d 635.
14. *Ingersoll Co.* v. *Dept. of Revenue*, 405 Ill. 367, 90 N. E. 2d 747.
15. *Supra*, n. 7, § 451.
16. C. C. H. Ill. State Tax Rep., ¶ 60-106.

dies, jigs, patterns and gauges produced to the special order of the purchaser is not taxable; the sale of those not produced to special order is taxable. By rule 12,[17] persons selling letterheads, envelopes, and labels are not taxable if the name of the purchaser is placed on such items, but are taxable if such items are not so personalized. By Rule 23,[18] sellers of tailor-made clothing are not taxable, but sellers of ready-to-wear clothes are taxable, even though such clothes are altered upon special order to the requirements of the purchaser. By Rule 25,[19] sellers of monuments who have placed an inscription thereon are not taxed, but sellers who have not placed an inscription thereon are not taxed, but sellers who have not placed an inscription on the monuments which they sell are taxed.

The Illinois Use Tax Act became effective in 1955. That act, by Section 3, imposes a tax at 2½% of the selling price upon the privilege of using tangible personal property purchased at retail from a retailer. It applies to the use of all property purchased from retailers for use in Illinois whether the retailer is obligated to pay the Retailers' Occupation Tax because he is doing business in Illinois or is not so obligated, by virtue of the commerce clause of the United States Constitution, Article I, Section 8, because he is not doing business in Illinois. The act is thus distinguishable from the Washington use tax act upheld under the commerce clause in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, which act effectively imposed a tax only on the use of property purchased in interstate commerce.

The term "selling price" is not defined,[20] however, so as to exclude property given in trade, unlike the Retailers' Occupation Tax Act. Hence, on sales transactions wherein

17. ibid., ¶ 60-120.
18. ibid., ¶ 60-126.
19. ibid., ¶ 60-128.
20. The definition is contained in Section 2 of the act.

property is given in trade, the use tax will exceed the Retailers' Occupation Tax.

Retailers are required, by Section 3 of the act, to collect the tax from users if they have a Certificate of Registration under the Retailers' Occupation Tax Act, or if they do not maintain a place of business in Illinois, but have been authorized under Section 6 of the Use Tax Act to collect the tax. Users, who purchase property from retailers not maintaining a place of business in Illinois and not authorized to collect the tax, are required by Section 10 of the act to remit the tax directly to the Department of Revenue. Section 9 requires retailers to remit the tax collected to the Department of Revenue, except that a retailer is not compelled to remit "that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property". Thus, while as to each retail sales transaction in which the Retailers' Occupation Tax is imposed, the Use Tax is also imposed, only the Retailers' Occupation Tax reaches the state treasury, the use tax being retained by the retailer. This, plaintiff contends, results in the imposition of the use tax for a private purpose in violation of the due process clause of the Fourteenth Amendment.

Even though the use tax is exacted for the use of property, not for engaging in the occupation of selling it, the use tax is not imposed, by the dictate of Section 3, if the seller would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois. Hence, to determine liability for use tax, one must first determine whether the seller is engaged in the business of selling tangible personal property at retail. If he is not, no use tax is due on the transaction. The use of property purchased from one making an isolated or occasional sale and not habitually engaged in making retail sales is not taxed. Nor, following the rules, noted

above, promulgated under the Retailers' Occupation Tax Act, is the use of machines manufactured to the special order of the purchaser, personalized letterheads, tailor-made clothes, or monuments containing an inscription taxable, by way of examples.

The effect of these exclusions is to deny equal protection of the law. While the classification is reasonable for the occupation tax, it is unreasonable and arbitrary for the use tax. In countless instances two persons will purchase identical or substantially identical property, as, for example a tailor-made suit by one and a ready-made suit by the other, neither article capable of any different use than the other. Despite the fact that the use of the property is the incident of the tax, one will be taxed and the other will not.

Section 9 of the act entitles a user, returning property to a retailer from whom the property was purchased and to whom the user has remitted the use tax, to a refund of the tax. But no provision is made under Section 10 for a refund to a user who returns the property he purchased to the seller but who paid the tax in the first instance directly to the Department of Revenue. This is a patent denial of equal protection.

(c) Time, Manner and Method by Which Questions Sought to Be Reviewed Were Raised and Considered.

On February 1, 1957, Justice Schaefer of the Illinois Supreme Court entered an order[21] that the brief and the answer to the petition for rehearing filed by Burgess-Norton Mfg. Co. and the law firm of McDermott, Will & Emery as *amici curiae* in *Turner* v. *Wright*, 11 Ill. 2d 161, 142 N. E. 2d 84, should stand as the briefs of the plaintiff in this cause, that defendants' brief, petition for rehearing, and reply to the answers to the petition for rehearing filed

21. R. 70-71.

in that case should stand as defendants' brief in this case, and waiving the filing of an abstract of record. On June 12, 1957, the Illinois Supreme Court, by order,[22] granted the motion[23] of plaintiff that the briefs and answer to the petition for rehearing filed by the plaintiff in *Turner* v. *Wright, supra,* should stand additionally as the briefs of the plaintiff in this case, and that the opinion of the Illinois Supreme Court in this case should be deemed to have included a consideration of the issues raised by those briefs and answer to the petition for rehearing. No further briefs were filed with the Illinois Supreme Court in this case.

The issues involving the equal protection clause were raised in paragraphs 9, 10, and 11 of the intervening petition filed by plaintiff in the Circuit Court of Sangamon County.[24] The due process issue was not raised, as such, in that court.[25]

---

22. R. 99.

23. R. 96-98.

24. Paragraph 9 of the petition (R. . .) cited instances wherein users were not taxed because their sellers were not deemed "retailers". Paragraph 10 (R. . .) urged that no provision for refunds was made for users returning property to retailers to whom the use tax had not been remitted. Paragraph 11 stated:

> "11. Section 1 of Amendment XIV of the Constitution of the United States provides, among other things, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The said Use Tax Act is repugnant to the said constitutional prohibition for the reason that it seeks to impose the said Use Tax upon certain users of tangible personal property while exempting therefrom other users of substantially similar or identical tangible personal property, predicating the selection of the persons who shall and those who shall not pay the tax upon distinctions and considerations which are arbitrary and unreasonable and have no relation whatsoever to the use of the said tangible personal property which is taxed. Some of the particulars with reference to the said discriminations are set forth in paragraphs 9 and 10 hereof, which are incorporated by reference in this paragraph.

25. Plaintiff asserted that the fact that the use tax was retained by retailers in the majority of cases violated the requirement of

The argument that the act, in taxing the use of property purchased from "retailers" but not the use of identical property purchased from sellers not deemed to be "retailers", violated the equal protection clause was raised at pages 30 to 34 of the brief filed by the appellant in *Turner* v. *Wright*, *supra*,[26] and pages 31 to 36 of the brief filed by *amici curiae* in that case.[27] This contention was not considered, as such, by the Illinois Supreme Court in its final opinion in the *Turner* case.[28] The Court directed itself, in this regard, to the question whether the act satisfied the requirement of Article IX, Section 1 of the Illinois Constitution[29] that all privilege taxes be uniform as to the class upon which they operate. The

---

Article IX, Section 7 of the Illinois Constitution (Smith-Hurd Ill. Anno. Stat., Vol. "Constitution", p. 757) that all taxes be paid into the state treasury.

26. R. 100:

"As previously pointed out, buyers from persons engaged in service occupations (with the sole exception noted in Division III hereof) are not required to pay the use tax. The result is that a preferred class of buyers has been exempted from the tax. • • • We submit that the Use Tax Act, for the reasons given, is discriminatory and not uniform as to class; and, under the decisions cited, it violates the uniformity clause of Sec. 1 Art. IX, Sec. 2 Art. II and Sec. 22 Art. IV of the Illinois constitution and the Fourteenth Amendment to the United States Constitution."

27. R. 102:

"In plaintiff's brief it is noted that the Use Tax Act unreasonably and unconstitutionally taxes those purchasing from persons not engaged in service occupations while exempting from tax those purchasing from persons engaged in service occupations. The flagrancy of such a discrimination deserves emphasis in addition to such emphasis as is made in plaintiff's brief.

• • • • •

"Accordingly, the Use Tax Act unreasonably classifies those subject to the tax in violation of Section 1 of Article IX of the Illinois Constitution, and denies to certain purchasers subject to tax the equal protection of the laws in violation of Section 1 of Amendment XIV to the United States Constitution."

28. App. D, *infra*.

29. *Supra*, n. 1.

opinion of the Illinois Supreme Court in this case[30] was stated to be based on its decision in the *Turner* case.

The argument that the act violates the equal protection clause in failing to provide for refunds to users returning purchased property but paying the tax directly to the Department of Revenue while making such a provision for users returning merchandise to retailers to whom they remitted the use tax in the first instance was raised at pages 29 to 30 of the appellant's brief filed in *Turner* v. *Wright, supra.*[31] This argument was not discussed by the Illinois Supreme Court in its opinion in the *Turner* case.

The due process argument was raised at pages 3, and 17 to 19 of appellant's brief in *Turner* v. *Wright, supra.*[32] The argument was considered by the Illinois Supreme Court in its opinion in the *Turner* case, in terms of the Illinois Constitution, not the United States Constitution.[33]

---

30. App. B, *infra.*

31. R. 100:

"Sec. 9 provides that in case a retailer collects the tax and the purchaser thereafter returns the property purchased, the retailer shall refund the purchaser on account of the tax paid. No provision for refund is made in favor of a taxpayer who does not buy personal property from a retailer with a license but pays the tax directly to the Department of Revenue.

"Here we have a discrimination between two classes of taxpayers without reasonable basis. This is a violation of the equal protection clauses of the state and federal constitutions, and the uniformity clause of Sec. 1, Art. IX of the Illinois constitution."

32. R. 100: It is stated on page 3 of that brief:

"Sec. 9 of the act allows a retailer collecting the use tax for the state to retain it as his own and the tax never reaches the state treasury. As a consequence non-taxpayers are the sole beneficiaries of the taxes paid by taxpayers. It is a violation of the due process of law provisions of the state and federal constitutions to take a citizen's money from him under the guise of taxes and then refund it to one who was not the taxpayer."

33. App. D, *infra*, pp. 44-45.

No assignment of errors was filed in the Illinois Supreme Court because Rule 36 of the Illinois Supreme Court Rules[34] does not require that such an assignment be included in the record on appeal.

THE QUESTIONS ARE SUBSTANTIAL.

(a) The Jurisdictional Authorities Sustain This Court's Jurisdiction.

As demonstrated, the questions presented on this appeal were fully presented to the court below. Nonetheless, that court sustained the validity of the Illinois Use Tax Act. Since the validity of a state statute was thus drawn in issue in terms of the United States Constitution, and since its validity was upheld, this Court has jurisdiction to entertain this appeal, *McCollum v. Board of Education*, 333 U. S. 203, 206; *Stewart & Co.* v. *Sadraqula*, 309 U. S. 94, 97.

The mere fact that the Illinois Supreme Court did not discuss any of the issues raised expressly in terms of the United States Constitution does not preclude this Court from jurisdiction. It is enough that the Federal issues were fully presented, as they were, and implicitly passed upon, as they were because the Court upheld the Use Tax Act in the face of the objections, *Bowe* v. *Scott*, 233 U. S. 658, 662; *Schlemmer* v. *Buffalo, Rochester and Pittsburgh Ry. Co.*, 205 U. S. 1, 11. That the due process issue was not raised as such in the trial court is immaterial to the jurisdiction of this Court since the Illinois Supreme Court considered the issue before it on appeal,[35] *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407.

---

34. Ill. Rev. Stat., 1955, Ch. 110, § 101.36(2)(a).

35. As noted, *supra*, p. 10, the Court entered an order on June 12, 1957 granting plaintiff's motion that its opinion herein of May 23, 1957 be deemed to have included all of the issues raised by the brief of the appellant in *Turner* v. *Wright*, 11 Ill. 2d 161, 142 N. E. 2d 84. The due process issue was raised in that brief, see p. 12, *supra*.

Nor does the jurisdiction of this Court fail because plaintiff did not petition the Illinois Supreme Court for a rehearing, *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 319, as it was entitled to do within fifteen days after the filing of the court's opinion.[36]

Moreover, plaintiff is directly affected by all of the issues raised. It is and has been subjected to tax by an act which must either be accepted in its entirety or rejected in its entirety. As to the exclusion of users who purchase from those not engaged in the business of retailing, the Illinois Supreme Court so held in its first opinion.[37] The Court's reasoning would apply equally to the other constitutional objections, for the Court stated:

> "We consider the provisions of this act so mutually connected and dependent, as conditions, considerations, and compensations for each other, that the legislature intended them as a whole, and the entire act must fall."

This Court should accept the construction of the state court, *Madden* v. *Kentucky*, 309 U. S. 83, 86-87. Its construction is supported by the decisions of both this Court and the Illinois Supreme Court.[38]

(b) The Equal Protection Issues Are Substantial.

The Illinois use tax is imposed on the privilege of using tangible personal property. It is not exacted for the privilege of purchasing property, nor for the privilege of selling it. The taxable event is simply the use of tangible personal property.

But whether liability for the use tax attaches to the use of property is made to depend upon the nature of

---

36. Ill. Rev. Stat., 1955, Ch. 110, §101.44(1).

37. App. C, *infra*, pp. 37-38.

38. *Allen* v. *Louisiana*, 103 U. S. 80; *Winter* v. *Barrett*, 352 Ill. 441, 186 N. E. 113.

the seller. If the seller is engaged in the occupation of selling at retail, the purchaser must pay the tax. If the seller is deemed to be engaged primarily in performing a service, or if he does not habitually engage in the business of retail selling, but makes isolated or occasional sales of personal property, the purchaser need not pay the tax for the use of the property which he buys.

As a result of this distinction which is not inherent in the use of property which is the incident of the tax, in numerous instances, the uses to which taxpayers and those not taxed can put the property which they purchase are identical, and the property acquired by them is identical or substantially so. Yet it is the use which is taxed. Thus the act makes an arbitrary and unreasonable classification which plaintiff asserts denies it the equal protection of the laws, *Smith* v. *Cahoon*, 283 U. S. 553.

The occasions of discrimination are many, but a single example will serve to illustrate. One man buys a tailor-made suit. A second man purchases a ready-made suit, and pays for substantial alterations. As the court below stated, "so far as the use by the purchaser is concerned there is no distinction between a tailor-made suit of clothes, for example, and one purchased at retail." Yet, the second man must pay the use tax; the first need not.

Defendants contend, and the court below held, that the classification is reasonable because it is related to the purpose of rendering the Use Tax Act complementary to the Retailers' Occupation Tax Act. The Illinois Supreme Court stated:

> "But the tax before us does not stand alone. It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose."

The purported justification of the unreasonable classification is without merit.

The court below would sanction the classification merely because it is relatable to a legislative purpose, even though it is not based on differences between the taxed and the tax free. True enough, this Court has many times stated that legislative distinctions will not be invalidated if reasonably related to the object of the legislation, *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 214; *Welch* v. *Henry*, 305 U. S. 134, 144; *Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 578. Yet, this Court has also required in every equal protection case, "that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike," *Hart Refineries* v. *Harmon*, 278 U. S. 499, 502.

Thus, while the equal protection clause condones a classification based on differences if the differences are reasonably related to the legislative purpose, it does not waive the requirement that there be differences merely because the classification has some relationship to a legislative purpose. The cases which have approved legislative distinctions related to the object of legislation have in each case pointed out the differences between those taxed and those not taxed. In the *Rapid Transit Corp.* case, *supra*, for instance, the Court stated:[39]

> "Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relativ freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions."

---

39. 303 U. S. 579.

Since the classification of the Use Tax Act does not rest upon any difference between the taxed and the tax free, as the court below concedes, the classification cannot escape the condemnation of the equal protection clause despite its relationship to the purpose of the legislation.

Moreover, the court below ignores the fact that whatever the relationship of the classification to the legislative purpose, it was not compelled by that purpose. The Retailers' Occupation Tax Act applies only to those engaged in the business in Illinois of retail selling. Prior to the adoption of that act, Illinois purchasers could buy property for use in Illinois out of the state tax free. Illinois purchasers could thereby deplete the business of Illinois merchants and reduce collections under the Retailers' Occupation Tax Act to the extent that purchases were made out of the state merely to avoid the tax. Presumably, the Use Tax Act was designed to prevent these depletions. Yet, if all those who purchased from persons engaged in service occupations were also subjected to the use tax, this purpose would still be achieved. In terms of this fact, the effect of the opinion of the court below is to condone the removal of one evil by the legislature at the expense of the creation of a second, even though the first can be readily eliminated without producing the second.

Furthermore, the court below is incorrect in holding that the Use Tax Act complements the Retailers' Occupation Tax Act in a sense that is of substantive significance. The asserted complement is that while the use tax is on the purchaser and the retailers' occupation tax on the seller, the result of the two acts when taken together is that one tax reaches the state treasury with respect to each retail sale by a retailer, whether the sale is made in interstate or intrastate commerce. Such a complement is not of the sort that can free the classification of the Use Tax Act from the stigma of its equal protection clause violation.

Other cases are to be distinguished. In *Henneford v. Silas Mason Co.*, 300 U. S. 577, the Washington use tax was deemed not to discriminate against interstate commerce, even though effectively imposed only on the use of property purchased in interstate commerce, since intrastate purchasers were taxed under the sales tax. This court held the two acts to be "complementary", that they should be considered together, and that, so considering them, no discrimination resulted. A similar result, as to both interstate commerce and equal protection objections, was reached for similar reasons in *Gregg Dyeing Co. v. Query*, 286 U. S. 472.

Here, unlike those cases, even though the Retailers' Occupation Tax Act and the Use Tax Act be considered together, discrimination, in the failure of the Use Tax Act to tax users who purchase from those engaged in performing services as well as those who purchase from retailers, remains, and the alleged complement cannot excuse the denial of equal protection. Comparably, in *Wheeling Steel Corp. v. Glander*, 337 U. S. 562, an Ohio *ad valorem* tax was struck down under the equal protection clause when the reciprocity features of the taxing act did not achieve the equality claimed for them.

Moreover, the Use Tax Act does not, in fact, complement the Retailers' Occupation Tax Act in any sense. Instead it effectively repeals the act which it supposedly complements. The use tax is imposed on all users of property purchased at retail, whether the property is purchased in interstate or intrastate commerce. The act, therefore, taxes the user for the use of the same property for the sale of which the retailers are taxed under the Retailers' Occupation Tax Act. Whenever the Retailers' Occupation Tax Act applies, the Use Tax Act also applies. Double taxation on intrastate retail sales transactions is avoided simply by letting retailers retain the use tax which they collect if they are remitting the retailers' tax with respect to the same transaction.

That the retailers continue to pay the retailers' tax is no more than a fiction, maintained only by permitting the retailers to put the use tax which they collect into one pocket and by requiring them to take the retailers' tax out of the other. Though nominally the retailers' occupation tax is paid into the state treasury, in substance it is not. In substance it is the use tax which is paid into the state treasury as to both intrastate and interstate transactions. The Retailers' Occupation Tax Act is, therefore, effectively repealed. Moreover, if the Retailers' Occupation Tax Act were actually as well as practically repealed, the alleged consequence of taking the two acts together, that one tax reaches the state treasury with respect to one retail sales transaction, would still be achieved. As a result, the Use Tax Act must stand alone, contrary to the opinion of the court, and its classification must be justified on that basis.

But the classification cannot be so justified. This the court below apparently concedes.[40] While the court's opinion is couched in terms of the uniformity requirement of the Illinois Constitution,[41] what applies with respect to that requirement should apply in equal degree to the equal protection clause.

The absence of a true complement is also evident from the fact that the Use Tax Act broadens the base of the Retailers' Occupation Tax Act. The former imposes a tax on the value of property given in trade. The latter does not. If the selling price of an automobile is $3,000, and a purchaser is given a $1,000 credit for a used car given in trade, so that the cash price is $2,000, the use tax is $75 and the retailers' tax only $50.

The fact that the Use Tax Act broadens the base of the

40. Justice Davis stated dissenting, App. D, *infra*, p. 51, "• • • the majority implicitly concede that the Use Tax Act, if it stood alone, would be unconstitutional for lack of uniformity • • •"

41. *Supra*, n. 1.

Retailers' Occupation Tax Act further points up the incongruity of the reasoning of the Illinois Supreme Court. The court below would authorize the legislature to discriminate in the interest of protecting but not broadening the base of the Retailers' Occupation Tax Act, but at the same time would permit the legislature to broaden that base by the act effecting the discrimination.

Once the principle that legislative classifications must be reasonable, not arbitrary, is ignored by reasoning as spurious as that employed by the court below, absurdities are difficult to avoid. This is evident from the opinion of the court below. In answer to the proposition that the use tax could not be sustained as a privilege tax under the Illinois Constitution, the Illinois Supreme Court said, "Such a protective tax can depend for its justification upon the tax that it supports."[42] Then, referring to a provision relating to building contractors, and reducing its reasoning to its ultimate absurdity, the Court stated:[43]

> "In any case, so far as the use tax is concerned, this particular provision stands upon no different footing than the others that are designed to correlate the two statutes. If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it."

The dissenting opinion summarized the doctrine of the majority this way:[44]

> "The effect of the majority decision seems to be that once a tax is enacted for the general purpose of protecting a prior tax the subsequent tax (1) need not meet constitutional limitations, (2) cannot be constitutionally attacked if it complements similar provisions of the prior act; and (3) can go further than protection and can create an entirely new tax."

42. App. D, *infra*, p. 43.
43. App. D, *infra*, p. 48.
44. App. D, *infra*, p. 55.

This doctrine of the court below serves only to emphasize the extremes to which the court has forced itself in its attempt to justify the arbitrary and unreasonable classification of the Use Tax Act.

The court did not comment on the patent denial of equal protection resulting from the provision for refunds to purchasers returning property to retailers to whom they had remitted the use tax but not to purchasers returning property but paying the tax directly to the Department of Revenue. Defendants contended below that such a provision for the latter group was made by Section 10 of the act. This court, exercising its power of construction in the absence of an interpretation by the Illinois Supreme Court, *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 75, should have little difficulty in finding that no such provision is made.

The explanation for the discrimination is apparently that the legislature sought to make the Use Tax Act "complementary" to the Retailers' Occupation Tax Act, by providing for refunds to correspond to those authorized by the latter act,[45] but sought to go no further. This explanation further emphasizes the absurdity of attempting to justify a discrimination in the name of a "complement," when, even though the two acts are taken together, the discrimination remains.

(c) The Due Process Issue Is Substantial.

As stated above, while the Use Tax Act in form authorizes retailers to retain the use tax which they collect to the extent they are remitting retailers' occupation tax on the same transaction, in practical effect the use tax reaches the state treasury, and the retailers' tax does not. The retailers are, therefore, relieved of the obligation to remit

45. Section 6, Ill. Rev. Stat., 1955, Ch. 120, § 445.

the retailers' occupation tax, and the Retailers' Occupation Tax Act is effectively repealed. If this reasoning is accepted, then the classification of the Use Tax Act cannot be justified on the ground that that act complements the Retailers' Occupation Tax Act. It is fatuous to suggest that one act complements another, when the supposedly complemented act has been effectively repealed.

On the other hand, if this reasoning is not accepted, then a violation of the due process clause results. For, if the use tax is deemed in substance retained by the retailers, and not paid into the state treasury, use taxpayers must give up their property for the private purpose of having it bestowed upon the retailers.

Moreover, the retention of the use tax by retailers in such case would not be occasional. It would occur potentially in the case of every Illinois retail sale by a retailer in intrastate commerce. Millions of dollars in taxes would thus be retained by retailers.

The rule is, of course, too well settled to deny that the imposition of a tax by a state for a merely private purpose violates due process requirements, *Green* v. *Frazier*, 253 U. S. 233, 238. The question is rather, in each instance, whether the impost is exacted for a public or a private purpose.

There is certainly no public benefit in bestowing public funds upon retailers *qua* retailers. Such a gift is as devoid of public purpose as the loans to private manufacturers held violative of due process in *Loan Association* v. *Topeka*, 87 U. S. (20 Wall) 655 and *Parkersburg* v. *Brown*, 106 U. S. 487, and the limitation on the oil production of one group to force that group to purchase part of its oil requirements from a second group struck down in *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55.

The court below stated that the provision authorizing the retention of the use tax by retailers can be considered a gift of public funds for a private purpose "only if the way in which the two taxes are interrelated is ignored".[46] If the court meant by this that the use tax is in each case in practical effect paid into the state treasury, then as indicated above, the proposition that the classification of the Use Tax Act can be justified on the basis of its "complementing" the Retailers' Occupation Tax Act must fall.

On the other hand, if the court below deemed the use tax to be in effect retained by the retailers and meant by its statement only that the legislative purpose, in authorizing retailers to retain the use tax, was to prevent more than one tax being paid into the state treasury with respect to each retail sales transaction, then the court's proposition is no answer to the argument that the Use Tax Act is repugnant to the due process clause. Such a rationale serves only to emphasize the lack of public benefit in the retention of the use tax by retailers. For it says in effect that the legislative scheme was to be effected by a non-state use of the public funds collected by the retailers. Thus, the legislative purpose was that the use tax would be directed to private benefit. Such a purpose is patently a private one, and the mere incidental fulfillment of a pattern of legislation does not make it otherwise.

---

46. App. D, *infra*, p. 45.

CONCLUSION.

The questions presented are of substantial importance, and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

E. H. McDermott,
Richard S. Oldberg,
Leonard S. Schmitz,
Hamilton Smith,
111 West Monroe Street,
Chicago 3, Illinois,
Attorneys for Appellant.

September, 1957.

APPENDIX A.

Judgment of the Illinois Supreme Court.

The following is a copy of the judgment of the Illinois Supreme Court appealed from:

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of May, in the year of our Lord, one thousand nine hundred and fifty-seven, within and for the State of Illinois.

Present:

Ray I. Klingbiel, Chief Justice; Justice Joseph E. Daily; Justice Walter V. Schaefer; Justice George W. Bristow; Justice Harry B. Hershey; Justice Charles H. Davis; Justice Byron O. House; Latham Castle, Attorney General; Robert G. Miley, Marshal.

Attest:

Mrs. Earle Benjamin Searcy, Clerk.

Be It Remembered, that, to-wit: on the 23rd day of May, 1957, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Burgess-Norton Mfg. Co., an Illinois Corporation, *Appellant*, vs. Richard J. Lyons, Director of the Department of Revenue of the State of Illinois, and Warren E. Wright, State Treasurer of the State of Illinois, *Appellees*.	Appeal from Circuit Court Sangamon County. 1046A-55 Error to.

No. 34137

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Sangamon County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

APPENDIX B.

Opinion of the Illinois Supreme Court in This Cause.

Docket No. 34137—Agenda 9—March, 1957.

BURGESS-NORTON MANUFACTURING COMPANY, *Appellant*, v. RICHARD J. LYONS, Director of Revenue, *et al.*, *Appellees*.

Per Curiam: Complaint for a declaratory judgment that the Use Tax Act (Ill. Rev. Stat. 1955, chap. 120, par. 439.1-439.18 incl.) is unconstitutional and for temporary injunction was filed in the circuit court of Sangamon County. Upon motion the trial court dismissed the complaint for want of equity, but continued the temporary injunction in effect until the final determination of the cause.

The questions raised in this proceeding were determined at the March term of this court, in *Turner* v. *Wright*, Docket No. 34044, wherein we held the Use Tax Act to be constitutional, and wherein the present plaintiff filed brief and argument as *amici curiae*. Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

MR. JUSTICE DAVIS, dissenting. (See dissent in *Turner* v. *Wright*, No. 34044.)

APPENDIX C.

First Opinion of the Illinois Supreme Court in Turner v. Wright.

Docket No. 34044—Agenda 42—May, 1956.

JOHN W. TURNER, JR., *Appellant*, v. WARREN E. WRIGHT, State Treasurer, *et al.*, *Appellees*.

MR. JUSTICE DAVIS delivered the opinion of the court:

This case comes to us on direct appeal from the order of the circuit court of Cook County dismissing plaintiff's complaint for a declaratory judgment and injunction against the enforcement of the Illinois Use Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18), and the 1955 amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77) which made certain incidental but necessary changes as an enforcement aid to the Use Tax Act, on the ground that such enactments are unconstitutional.

The plaintiff, a citizen and taxpayer of Illinois, purchased a motor vehicle in Indiana on August 1, 1955, from a retail automobile dealer, and thereafter took possession of, and brought said vehicle into Illinois, where he used and operated it. By the terms of the Use Tax Act, he was required to pay a use tax to the Department of Revenue, which he did under protest. The case squarely questions whether the Illinois Use Tax Act contravenes the revenue provisions of the constitution of the State of Illinois, as well as other constitutional guarantees.

It is the contention of the plaintiff that the Use Tax Act violates the Illinois constitution and the fourteenth amendment to the United States constitution. *Amici curiae* urge

that the use tax is not in fact a privilege tax, but rather that it is a property tax without uniformity and that the act unreasonably classifies persons, all in violation of section 1 of article IX and the fourteenth amendment.

The defendants, by the Attorney General, argue that the Illinois use tax is a nondiscriminatory tax, and that the act is not vague but is justified as being complementary to and a corollary of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453). Defendants further contend that any discriminatory provision contained in the act is severable.

Before analyzing the specific constitutional objections raised, we believe it proper to examine generally the provisions of the Illinois Use Tax Act. The act imposes a tax upon the purchasers of all tangible personal property purchased at retail and not for the purpose of resale. The tax is at the rate of 2½ per cent of the selling price, and is imposed upon all purchasers whether they buy within or outside the State. If the taxpayer buys from a retailer licensed under the Retailers' Occupation Tax Act, the retailer is required to collect the tax and give the buyer a receipt. A nonresident retailer is entitled to obtain a permit from the Department of Revenue and collect and remit the tax. If a taxpayer purchases property from a retailer who is not required to file returns with the Department and does not pay the tax to the retailer, the taxpayer shall file a return and pay the tax directly to the Department of Revenue. However, if a particular seller, such as one engaged in a service occupation, would not be taxable under the Retailers' Occupation Tax Act if the sale had occurred in Illinois, then the tax imposed by the Use Tax Act does not apply. This is true except in the case of any person who is engaged in a business which is not subject to the tax imposed by the Retailers' Occupation Tax Act because of involving the sale of, or a contract to sell real estate, or

construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased; and which does not become real estate. In such a transaction, if a separate charge is made for tangible personal property so transferred, the value of such property shall be the amount separately charged, or if no separate charge is made, the value of such property shall be its cost to the transferor, and such use of tangible personal property is subject to the use tax although it would not be subject to the retailers' occupation tax.

While under the act, if a single sale of tangible personal property takes place in Illinois, the use tax and retailers' Occupational tax are both due, the Use Tax Act provides that a retailer need not remit that part of any tax collected by him to the extent that he remits the tax imposed by the Retailers' Occupation Tax Act. The act further provides that when the taxpayer pays the tax directly to a retailer, the latter may refund the money if the property is later returned to the retailer; however, no such refund provision is given a taxpayer who, by the act, is required to pay the tax directly to the Department of Revenue.

We think it helpful to a decision of the question before us to consider the history and development of the revenue article of our constitution, as well as the Use Tax Act, which was enacted in an effort to obtain revenue within the proscriptions of State and Federal constitutions. Originally, general property taxes were the principal source of revenue in Illinois, and our first constitution provided "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession." (Const. of 1818, art. VIII, sec. 20.) With the adoption of the constitutions of 1848 and 1870, the property taxes were continued as the principal source of revenue and provided

most of the revenue for State and local purposes. However, in the constitution of 1848, specific authority was granted to the General Assembly to impose taxes upon occupations, franchises and privileges. This provision was carried over into section 1 of article IX of our present constitution, adopted in 1870, but was made subject to the limitation that such a tax could only be imposed "by general law, uniform as to the class upon which it operates." While franchise and privilege taxes have been used from time to time, the specific constitutional limitations upon the taxing power of the State were not considered by this court until 1932, following the enactment of a graduated income tax law. This court then stated that section 1 of article IX limited the taxing power of the General Assembly to "(1) property taxes on a valuation basis; (2) occupation taxes; and (3) franchise and privilege taxes." (*Bachrach* v. *Nelson*, 349 Ill. 579, at page 589.) Thereafter the legislature enacted the present Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453) which imposed a tax upon the occupation of "selling tangible personal property to purchasers for use and consumption." The validity of this act was upheld in *Reif* v. *Barrett*, 355 Ill. 104, and thereafter the legislature no longer relied upon a property tax to provide funds for the various activities of the State. Since then tax revenues have been derived from the retailers' occupation tax and other occupational, franchise and privilege taxes imposed by the legislature. Winning, The Revenue System of Illinois, S. H. A. chap. 120, p. 1.

At the time of the enactment of the Retailers' Occupation Tax Act, the legislature had already levied an inheritance tax which was sustained as a privilege tax (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Kochersperger* v. *Drake*, 167 Ill. 122), and a motor vehicle tax which was sustained as a tax upon the privilege of operating a motor vehicle upon public highways. (*People* v. *Deep*

Rock Oil Corp., 343 Ill. 388.) In 1941 the legislature also enacted the Cigarette Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 453.1-453.30), which imposed an occupation tax upon persons engaged in business as distributors of cigarettes. While these sources of revenue were not objectionable as being violative of the constitution of Illinois (cf. *Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579,) the Illinois legislature was still limited by the commerce clause of the constitution of the United States, which prohibited a sales tax or retailers' occupation tax which, when imposed on a transaction, burdened interstate commerce. (*Norton Co.* v. *Department of Revenue*, 340 U. S. 534.) The Illinois retailers' occupation tax could be avoided by the purchase of tangible personal property outside the State for use within the State.

This problem was common throughout the States of the nation, and in order to encompass this source of revenue, legislative draftsmen formulated a so-called "use tax" to obviate the proscription of the commerce clause of the United States constitution, and such tax has been repeatedly upheld as a tax "not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end." (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577.) A logical result of this distinction was the enactment of use taxes in 28 States for the purpose of gathering in revenue from transactions beyond the constitutional scope of their particular sales or retailers' occupation tax acts. (CCH State Tax Guides.) We think it clear, as all parties seem to concede, that the dominant purpose of the act before us was to complement the valid Retailers' Occupation Tax Act and remove the buyer's temptation to order merchandise in other States in an effort to escape payment of the tax on local sales. (*Johnson* v. *Halpin*, 413 Ill. 257.) The Illinois Use Tax Act therefore appears to have its genesis in the same considerations that gave rise to other

so-called "use tax" statutes. (*Miller Bros.* v. *State of Maryland*, 347 U. S. 340.) It now seems certain that the tax before us is inoffensive to the commerce clause of the Federal constitution. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359.

No effort was made in Illinois to reach out-of-State purchases until the enactment of the Cigarette Use Tax Act in 1951. (Ill. Rev. Stat. 1955, chap. 120, pars. 453.31-453.67.) The constitutionality of this act was upheld in *Johnson* v. *Halpin*, 413 Ill. 257, and this decision led to the enactment of the present use-tax legislation. However, we made it clear when we struck down the motor vehicle use tax in *People ex rel. Schoon* v. *Carpentier*, 2 Ill. 2d 468, that a tax may not comply with the constitution merely because the legislature designates it a use tax.

We think it clear that the tax before us is not a property tax, nor is it a franchise or occupation tax. It must be sustained, if at all, as a tax upon a privilege. As such it must be "uniform as to the class upon which it operates."

With this historical background in mind, we turn to the attacks upon this particular act. We are not concerned with its wisdom, purpose, or benefits; the question before us is whether it complies with the Illinois and Federal constitutions.

The plaintiff urges that the tax does not meet the uniformity requirement of the constitution and that it is discriminatory in that it is imposed on users of tangible personal property purchased from retailers, as defined in the act, but not on users of property purchased from others; that the act imposes a tax upon purchasers from those engaged in the building trades, but not upon purchasers from other service occupations; and that the act provides for refunds to certain taxpayers returning property to retailers licensed under the act, but not to taxpayers who buy from others. Defendants answer that these discrimi-

nations are justified because the act is complementary to the retailers' occupation tax.

We think there is merit in plaintiff's contentions. The present retailers' occupation tax is levied upon the "occupation" of selling tangible personal property at retail for use and consumption. Since it embraces all persons engaged in such "occupation," it is clearly uniform upon the class on which it operates. (*Reif* v. *Barrett*, 355 Ill. 104.) This court invalidated a prior Retailers' Occupation Tax Act, as discriminatory and lacking in uniformity, which for the purposes of that act, declared that " 'tangible personal property' does not mean or include farm products or farm produce sold by the producer thereof * * *." (*Winter* v. *Barrett*, 352 Ill. 441, 459.) This court, in construing the Retailers' Occupation Tax Act, has held that the tax is only upon the occupation of selling tangible personal property at retail for use and consumption, and therefore has held it inapplicable to persons engaged in service occupations. (*Burroughs Co.* v. *Hollingsworth*, 415 Ill. 202; *Material Service Corp.* v. *Hollingsworth*, 415 Ill. 284; *Ingersoll Milling Machine Co.* v. *Department of Revenue*, 405 Ill. 367; *Svithiod Singing Club* v. *McKibbin*, 381 Ill. 194; *Mason* v. *Nudelman*, 377 Ill. 331; *Babcock* v. *Nudelman*, 367 Ill. 626.) The fact that these sales and transactions are without the scope of the act does not render the Retailers' Occupation Tax Act discriminatory and nonuniform since it levies a tax upon the occupation of selling tangible personal property at retail for use and consumption, and the service occupations that are not taxed are not within that occupational classification.

In the Use Tax Act now before us, however, the incident of taxation is not the occupation but "the privilege of using tangible personal property in this State." Section 2 of the Use Tax Act defines "use" as the "exercise by any person of any right or power over tangible personal prop-

erty incident to the ownership of that property." Section 3 of the act provides: "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State." This provision creates a class of tangible personal property users who are exempt from tax by virtue of the fact that they purchased such property from a seller who is not liable for a retailers' occupation tax on the sale in question. Section 2 of the act, however, removes users of personal property purchased from building contractors from such classification and declares that users of such property are not within such exempt class and are subject to the tax. While the uniformity clause of the Illinois constitution does not prohibit a use tax having exemptions and classifications, it does proscribe exemptions and classifications which are discriminatory or without a reasonable basis. Since the incident of use taxation is the use of tangible personal property, we can see no justification for a classification which exempts from such tax all persons who use such property merely because their seller is not taxable under the Retailers' Occupation Tax Act. If the tax is upon the use, why should a person using a suit purchased at a retail store bear the burden of the tax, while his neighbor who wears a tailor-made suit be exempt therefrom? Similar questions could be posed in connection with the other occupations classed as service occupations under the Retailers' Occupation Tax Act. In all of these cases the incident of taxation, the "use," is identical. The exempt classification created has no relation to the use of the property, but rather is bottomed on whether the person selling to the exempt taxpayer would have been obligated to pay a tax under the Retailers' Occupation Tax Act, and even this classification does not apply uniformly since the building contractor is removed therefrom.

We have held that a statutory classification resting upon substantial differences in kind, situation, or circumstance which is reasonably related to the legislative purpose does not offend the constitutional prohibition. (*Illinois Bell Telephone Co.* v. *Board of Review of Dept. of Labor*, 413 Ill. 37.) The uniformity required by section 1 of article IX of the Illinois constitution is that the classification must rest upon a reasonable basis and the legislation must apply uniformly to all members of the class. (*City of Chicago* v. *Willett Co.*, 1 Ill. 2d 311.) The Use Tax Act fails to meet these requirements. However, the defendants argue that it is constitutional for the sole reason that it is designed to complement the valid Retailers' Occupation Tax Act and prevent the avoidance of the payment of that tax. In so arguing, they place great emphasis on our recent decision in *Johnson* v. *Halpin*, 413 Ill. 257, where we sustained the Cigarette Use Tax Act on that basis. We do not consider the *Johnson case* applicable. In that case, the tax was laid uniformly upon the entire class of cigarette users under the provisions of the act; no user was exempt; and the ultimate result was that the economic burden was laid upon all Illinois users in the same amount.

The classification which the defendants here attempt to justify is not dependent upon a difference or distinction inherent in the use of property which is the incident of taxation. The difference is one that was created by the legislature in the Retailers' Occupation Tax Act. However, what is a legitimate classification when the incident of taxation is the occupation, is not necessarily a reasonable classification when the incident of taxation is the use of property. In resolving a similar issue in *Giebelhausen* v. *Daley*, 407 Ill. 25, at page 37, this court stated: "The principle applicable to a proper classification of persons subject to a law must rest on some difference which has a reasonable and just relation to the act in respect to which the classification is proposed."

The defendants argue that the complementary character of the act justifies its classifications. We are not impressed with this argument, and find that this tax is not in fact a complement to the retailers' tax. The Use Tax Act does not complete or make perfect the Retailers' Occupation Tax Act, instead it exempts a substantial class of users from the tax if their purchase is from a seller who is not liable for a retailers' occupation tax. A purchaser of personal property from a building contractor may be subject to a use tax while the building contractor would not be subject to a retailers' occupation tax. On the other hand, purchasers from vendors engaged in other service occupations, indistinguishable in their nature from that of a building contractor, would be exempt from the use tax as well as the retailers' occupation tax. Unlike use taxes enacted in other States, a user in Illinois is not exempt from taxation by the mere fact that a retailers' occupation tax is also paid on the same transaction. Under the Illinois act, the user must pay the tax, but this tax may be retained by the retailer who has paid a retailers' occupation tax. Clearly, this lack of uniformity as to the class on which it operates prevents this tax from equalizing the tax burden of the local retailers. (Cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 814; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. ed. 888.) Accordingly, we hold that the Use Tax Act violates the uniformity provision of section 1 of Article IX of the constitution of Illinois.

Defendants further argue that if the classifications contained in the act are unreasonable, the exemptions granted are severable, and the entire act need not fall. Regardless of the severability provision of the act, if we cannot say that the legislative body would have passed the enactment with the invalid portions eliminated, the entire statute must be held invalid. (*City of Chicago Heights* v. *Public Service Co.*, 408 Ill. 604.) In the case at bar, the attempt to com-

plement the retailers' occupation tax is evident. To strike out the exemptions carved by the legislature would be to impose a tax upon users not intended to be included by the legislature, and would be, in effect, the imposition of a tax by this court. We consider the provisions of this act so mutually connected and dependent, as conditions, considerations, and compensations for each other, that the legislature intended them as a whole, and the entire act must fall. *Winter* v. *Barrett,* 352 Ill. 441.

The 1955 amendment to section IV of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77,) was enacted as a companion provision of the Use Tax Act. It provides that where an applicant seeks a certificate of title for a motor vehicle, he must exhibit a receipt to the Secretary of State evidencing the payment of the use tax due on account of the purchase. In view of our decision concerning the validity of the Use Tax Act, we likewise declare this amendment to be unconstitutional.

The brief of *amici curiae* earnestly urges that the use of personal property is not a "privilege" within the meaning of the Illinois constitution. This argument goes to the broad power of the legislature to enact use-tax legislation. Sections 1 and 2 of article IX of the Illinois constitution provide:

"§ 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business,

vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

"§ 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution."

While we do not determine whether the use of personal property is such privilege, yet, subject to constitutional limitations, we find no prohibition in the foregoing sections of the revenue article against the enactment of such legislation. *Johnson* v. *Halpin*, 413 Ill. 257.

Other constitutional violations are urged, but need not be considered in view of our conclusion that the act lacks uniformity as to the class on which it operates. The decree of the circuit court dismissing the complaint must be reversed and the cause remanded with directions to grant the relief prayed.

Reversed and remanded, with directions.

APPENDIX D.

Second Opinion of the Illinois Supreme Court in Turner v. Wright, Together With the Dissenting Opinion.

Docket No. 34044—Agenda 36—January, 1957.

JOHN W. TURNER, JR., *Appellant*, v. WARREN T. WRIGHT, State Treasurer, *et al.*, *Appellees*.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, a resident of Illinois, bought an automobile in Indiana, brought it into Illinois and used it here. Under the terms of the Use Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18), a tax thereupon became due. He paid it under protest, and brought this action to secure a refund. The circuit court dismissed his complaint and he appeals.

The Use Tax Act was enacted in 1955. It imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer:" (Section 3.) It applies whether the property is purchased in Illinois or elsewhere. The term "use" is defined basically to mean the exercise "of any right or power over tangible personal property incident to the ownership of that property." (Section 2.) The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act (Section 3; cf. Ill. Rev. Stat. 1955, chap. 120, par. 441.) It does not apply to out-of-State transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid. (Section 3.) The tax is to be collected by the re-

tailer, but to the extent that a retailer remits the tax imposed by the Retailers' Occupation Tax Act, he is not required to remit the tax imposed by the Use Tax Act. (Section 9.) An out-of-State retailer may be licensed by the Department of Revenue to collect and remit the tax. (Section 6.) One who purchases from an out-of-State retailer who is not so licensed is required to pay the tax directly to the Department. (Section 10.) The act incorporates by reference many of the administrative provisions of the Retailers' Occupation Tax Act. (Section 12.)

The validity of the statute under the commerce clause of the Federal constitution is not challenged, but numerous other constitutional objections are advanced by the plaintiff and by *amici curiae* who were given permission to file a brief. The plaintiff concedes that the General Assembly has the power to pass a use tax, and directs his attack at specific provisions of the present act. *Amici curiae,* however, contend that the constitution of Illinois prohibits the passage of any general use tax. This is the most fundamental objection raised, and we consider it first.

The argument starts with the broad dictum of *Bachrach* v. *Nelson,* 349 Ill. 579, that the constitution restricts the taxing power of the General Assembly to (1) property taxes on an *ad valorem* basis, (2) occupation taxes and (3) franchise or privilege taxes. It is then pointed out that the present tax is obviously not a franchise or occupational tax, and that it cannot be sustained as a property tax because it is not levied on an *ad valorem* basis, or as a privilege tax because it does not involve conduct over which the General Assembly has "a special power of control."

The present tax purports to be a privilege tax, like the use taxes in effect in many other States. (129 A. L. R. 223; 153 A. L. R. 609.) Substantially the same argument that is made here was advanced against the Cigarette Use Tax Act in *Johnson* v. *Halpin,* 413 Ill. 257. The court there

analyzed the pertinent decisions and rejected the argument, saying: "On the basis of the foregoing analysis, it is apparent that the concept of 'privilege' with reference to the taxing power has not been limited in Illinois, or in other States, to conduct previously authorized by the legislature, or which the legislature could entirely abolish, or to benefits conferred by the State. For the right to use the streets and the highways, and the right to make *inter vivos* gifts which are effective at death, all of which have been sustained as taxable privileges in Illinois, were regarded as common rights open to all persons prior to legislative action thereon. Therefore, a taxable privilege may involve lawful rights and conduct enjoyed without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58.": 413 Ill. at 270.

In the *Johnson case* the court pointed to an additional ground upon which the Cigarette Use Tax could be sustained, saying: "Moreover, the selection of this particular privilege upon which to levy a tax is both reasonable and proper, since it is designed to complement the valid Cigarette Tax Act, and prevent the avoidance of the payment of that tax." (413 Ill. at 271.) The same considerations support the present tax.

It has been authoritatively said that "[m]any years of litigation have not resolved the uncertainties and ambiguities in the nonproperty provisions of Sections 1 and 2" of article IX of the constitution. (Cushman, Proposed Revision of Article IX, 1952 Ill. Law Forum, 226, 237.) Section 2 provides: "The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed

in such manner as may be consistent with the principles of taxation fixed in this constitution." This provision of the revenue article of the constitution has received varying interpretations. See, *e. g., Illinois Central Railroad Co.* v. *County of McLean*, 17 Ill. 291; *People* v. *Worthington*, 21 Ill. 170; *Raymond* v. *Hartford Fire Insurance Co.*, 196 Ill. 329; *Harder's Fire Proof Storage and Van Co.* v. *City of Chicago*, 235 Ill. 58; *Bachrach* v. *Nelson*, 349 Ill. 579; *Reif* v. *Barrett*, 335 Ill. 104; *Johnson* v. *Halpin*, 413 Ill. 257.

But the uncertainty that has persisted as to the precise scope of section 2 of article IX need not trouble us in this case. Use taxes were developed, as the plaintiff points out, to prevent evasion of the tax that applies when retail purchases are made within the State, and to protect the retail local merchant against diversion of his business to out-of-State sellers. Those are the purposes of the present tax. Such a protective tax can depend for its justification upon the tax that it supports. The principle is not new in our law. Upon this basis completed gifts *inter vivos* that are not subject to revocation have been included in the estate of the donor for inheritance tax purposes if they were made in contemplation of death. And the statute fixes a presumption that gifts made within two years of the donor's death were made in contemplation of it. (Ill. Rev. Stat. 1955, chap. 120, par. 375.) Such a provision has been regarded as necessary to protect the base of the inheritance tax. (See *Rosenthal* v. *People*, 211 Ill. 306; *In re Estate of Benton*, 234 Ill. 366; *People* v. *Danks*, 289 Ill. 542.) A supplemental tax so levied to protect an admittedly valid tax from evasion or avoidance is clearly, in our opinion, a tax that is "consistent with the principles of taxation fixed in this constitution." We hold, therefore, that the General Assembly is not without power to enact a use tax.

While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he

argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls upon purchases made within the State as well as upon those made outside, and thus introduces a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art. IV, sec. 23.

The statute povides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those pur-

poses are accomplished do not affect the validity of the statute.

It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he "is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction." (Section 8.) Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.

There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon "selling price," the latter on "gross receipts" from sales. "Selling price" is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, "including cash, credits, service and property of every kind or nature * * *." (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of "gross receipts" in the Retailers' Occupation Tax Act was amended so that it "means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade." (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase

price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the "gross receipts" on which the tax is computed, so that the tax would be $50. The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction. No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights.

The exemption provisions of the act are also attacked. The use tax falls on "the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." The basic terms employed in the Use Tax Act are those used in the Retailers' Occupation Tax Act and, except in the instance just discussed, they are so defined as to make the scope of the two acts the same. In addition, section 3 of the Use Tax Act contains the following provision designed to limit the impact of the tax to those transactions that would measure a tax under the Retailers' Occupation Tax Act: "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

There are actions that the retailers' tax does not reach,

because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element of sale. (See, *e. g.*, *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.

The argument would, we think, be persuasive if the use tax stood alone, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose. The question here is not whether the legislature is required to shape the use tax that it imposes to conform to the tax upon retailers, but whether it may constitutionally do so. We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden the base of the use tax beyond the limits of the occupation tax upon retailers is not before us.

In addition to his general attack upon the exemption scheme of the use tax, the plaintiff also challenges one particular exemption. In 1955 the General Assembly amended the Retailers' Occupation Tax Act so that the tax would reach tangible personal property in a finished form that was transferred in connection with a sale of

real estate or a building construction contract, but did not become a part of the real estate, such as bathtubs, stoves, refrigerators and the like. (Ill. Rev. Stat. 1955, chap. 120, par. 440.) To correlate the two taxes, the Use Tax Act includes a provision, in substantially the same language, bringing these same transactions within the scope of the use tax. (Section 1.) It is argued that the inclusion of this provision makes an invalid subclassification among those engaged in service enterprises, and that this subclassification makes the statute invalid. The distinction that the provision draws appears to be, as the plaintiff says, between the sale of personal property in a finished form, as in the instances enumerated, and its sale in an unfinished form. We are unable to see wherein such a distinction is improper. In any case, so far as the use tax is concerned, this particular provision stands upon no different footing than the others that are designed to correlate the two statutes. If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it.

The title of the Use Tax Act is: "An Act in relation to a tax upon the privilige of using tangible personal property in this State, to make appropriations to the Department of Revenue and to the Secretary of State in connection therewith and to make certain incidental but necessary corollary changes as an enforcement aid in the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, by amending Section 4 of said Uniform Motor Vehicle Anti-Theft Act." It is attacked under section 13 of article IV of the constitution on the grounds (1) that it includes two subjects, (2) that its title does not express the subject matter of the act and (3) that it introduces a new subject into the Uniform Motor Vehicle Anti-Theft Act. So far as we can ascertain, the validity of a title

that describes the provisions of an independent piece of legislation and also expressly amends an existing act has not been passed on by this court. The adjustments necessary to fit a new statute into the existing legislative scheme have heretofore been made by companion bills. In the only case that we are aware of that involved a statute in which a similar technique was used (*Routt* v. *Barrett*, 396 Ill. 322), the present question was not raised.

Section 13 of article IV provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act." This requirement prevents logrolling, and by limiting the contents of a bill to a single subject it outlaws legislative "riders," and so protects the veto power of the Governor against encroachment. I Debates and Proceedings of Illinois Constitutional Convention (1870), p. 536; *St. Louis* v. *Tiefel*, 42 Mo. 578; *Commonwealth* v. *Barnett*, 199 Pa. 161, 48 Atl. 976.

We think that it is clear that all of the provisions of the act deal with a single subject,—the imposition of a use tax,—which is clearly expressed in its title. Appropriations to enforce the act are germane to that subject. The amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act provides that the Secretary of State shall not issue a certificate of title for a motor vehicle unless the applicant furnishes a receipt showing that the use tax has been paid, or establishes that no tax is due. Such a provision is obviously relevant to the enforcement of the use tax.

But it is also argued that the Uniform Motor Vehicle Anti-Theft Act, as it stood before the amendment to section

4, dealt with a subject entirely unrelated to any tax, and that the amendment introduces into that act extraneous matter that is foreign to its title. The title of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½,) is "An Act in relation to the prevention of the theft of motor vehicles by requiring certificates of title for registered motor vehicles and the license of dealers in used motor vehicles, trailers, semi-trailers and parts thereof." The new provision introduced by the amendment relates to the issuance of certificates of title by the Secretary of State and so it falls within the title of the act. Evidence that the use tax has been paid or is not due will also show from whom the car was acquired and so will aid the Secretary of State in ascertaining that it was legitimately acquired. The legislative technique here used invites close scrutiny. It has an inherent potential that, if not closely confined, would trespass upon the objections of the constitutional provision. In this instance, however, the provision in question is germane both to the new statute and to the statute that is amended, and so it does not conflict with the constitution.

Plaintiff's remaining objections can be shortly stated and shortly disposed of. A purchaser who does not pay the tax to a retailer is required, under penalty, to file a return with the Department of Revenue. The statute does not prescribe the form of a return, and does not in so many words authorize the Department to do so, and plaintiff argues that it therefore violates the due process clause. There is little room for debate as to what is to be contained in a return under the act. The authority of the Department to administer the act is expressly stated in many of its provisions, and it is implicit throughout all of them. That authority is adequate to authorize the Department to prescribe a form of return.

Section 12 of the act incorporates, by reference to their

numbers and to the subjects with which they deal, sixteen sections of another statute, but does not identify by title the statute that contains the sixteen sections. Plaintiff argues that the act is therefore fatally vague and indefinite. The argument is without merit because section 12 makes it unmistakably clear, by capsule references to the matters dealt with in the incorporated sections, that those sections are in the Retailers' Occupation Tax Act. And even without the references to specific subjects, a reading of the statute as a whole would remove any reasonable doubt.

In our opinion the circuit court properly sustained the validity of the statute, and its decree is affirmed.

Decree affirmed.

Mr. JUSTICE DAVIS, dissenting:

I voice my dissent to what I believe to be an unprecedented opinion by the court. My conclusion is neither predicated on the wisdom or folly of the legislation, nor on what the court describes as its "cumbersome" methods, but rather is based on the conviction that the legislature has failed to enact a valid, uniform privilege tax within the limitations of the revenue article of our constitution. Const., art. IX, secs. 1 and 2.

If I interpret the decision correctly, the court implicitly concedes that the Use Tax Act, if it stood alone, would be unconstitutional for lack of uniformity, but find justification for this lack of uniformity in the legislature's purpose to protect the base of the retailers' tax. Indeed it appears that the court's decision is based on the assertion that "a protective tax can depend for its justification upon the tax that it supports."

I can find nothing in the revenue article nor in our decisions to indicate that a general protective purpose will

render a tax immune to constitutional objections. The court points to the tax on gifts in contemplation of death as one enacted for the purpose of protecting the base of the State inheritance tax. But I know of no case, including those cited by the court, which indicates that such a protective tax could be upheld regardless of its uniformity, or without being a tax upon a privilege. Thus, the court holds that while the legislature could not constitutionally enact the present use tax standing alone, since it first enacted a valid retailers' tax, with classifications peculiar to that occupation, it may now protect that tax by enacting a use tax without regarding constitutional requirements. Under this pronouncement, if the retailers' tax were repealed or substantially changed, those who use property in Illinois would be subjected to a clearly non-uniform and discriminatory tax. Such an objection was sufficient to strike down the Motor Vehicle Use Tax Act in *People ex rel. Schoon* v. *Carpentier*, 2 Ill. 2d 468, at 475-476, where we held: "It is contended that this tax is similar to that in the Cigarette Use Tax Act and that the act is valid as levying a complementary tax to that levied by the Retailers' Occupation Tax Act. Our decision in *Johnson* v. *Halpin*, 413 Ill. 257, is cited in support of this contention. That case can offer no such support as it is evident that there is a salient difference between the Motor Vehicle Use Tax Act and the Cigarette Use Tax Act. A review of the statutes will reveal that the former (by the Secretary's construction) provides for no general tax upon all users of motor vehicles in this State. If the Retailers' Occupation Tax Act were repealed or substantially changed those who bought motor vehicles from Illinois dealers would escape the burden of this use tax. However, as pointed out in *Johnson* v. *Halpin*, 413 Ill. 257, the cigarette use tax is a tax on the local use of cigarettes and in no way discriminates against purchasers

who buy their cigarettes outside of the State, since they pay the same tax as purchasers from Illinois distributors."

Nor can the court find precedent in *Johnson* v. *Halpin*, 413 Ill. 257, upholding the Cigarette Use Tax Act. In that case we pointed out that the operation of the act was uniform and nondiscriminatory among all users of cigarettes, and stated at page 270: "Therefore, a taxable privilege may involve lawful rights and conduct enjoyed without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58." We also stated at page 271: "However, as a privilege tax it must still conform to the constitutional requirements of uniformity as to the class upon which it operates." That opinion further recited that the cigarette use tax was levied upon the privilege of using cigarettes in this State, a privilege which the State could control or abolish, and I believe that fact, as well as the complementary nature of the act, persuaded the court to sustain the constitutionality of the enactment.

Section 1 of the revenue article requires that a privilege tax must be "uniform as to the class upon which it operates." (Const., art. IX, sec. 1.) The provisions of section 2 of article IX have never been thought to eliminate this requirement. In *Ohio Oil Co.* v. *Wright*, 386 Ill. 206, 220, we stated: "We have held that these two provisions do not prevent the legislature from placing a tax on some other business or occupation than that specifically enumerated in section 1. (*Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579; *Bessette* v. *People*, 193 Ill. 334.) However, such tax must be uniform as to the class upon which it operates, as is expressly provided by the constitution. A tax upon the occupation of producing oil is just as logi-

cal and valid a classification as is the occupation of engaging in the retail sale of tangible personal property for use or consumption, but like that tax it must operate uniformly upon a class. The designation of the persons composing a class may not be arbitrary or capricious, and uniformity may be violated by including those in fact not within the class, (*Banghart* v. *Walsh*, 339 Ill. 132; *Wedesweiler* v. *Brundage*, 297 Ill. 228; *Scully* v. *Hallihan*, 365 Ill. 185; *Svithiod Singing Club* v. *McKibbin*, 381 Ill. 194,) as well as by excluding those properly within it. *Lippman* v. *People*, 175 Ill. 101; *Winter* v. *Barrett*, 352 Ill. 441; *City of Chicago* v. *Ames* 365 Ill. 529."

But the court has now announced that the legislature may disregard uniformity and all other constitutional limitations provided the tax has the purpose of protecting another tax. The scope of this newly declared legislative taxing power is far beyond the constitutional proscriptions heretofore recognized.

The court announced a further dangerous doctrine in sloughing off plaintiff's objection to the subclassification of the sale of personal property in connection with sales of real estate or building contracts. It stated that "If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it." Thus, a taxpayer is denied the right to constitutionally attack a void requirement of a complementary act, when the principal statute contains a similar invalid provision. This is, to the best of my knowledge, the first pronouncement by this court of this novel legal principle, which I regard as violative of the constitutional rights of the plaintiff.

While sustaining the use tax because of its complementary character, the court permits that tax to actually raise the base of the retailers' tax. The retailers' tax

base is on "gross receipts" which excludes credit given for property taken in trade. The use-tax base is the selling price which disregards the value of such "trade-ins." Under the court's interpretation, the use tax increases the tax on all "trade-in" transactions, while not affecting the retailers' tax on "non-trade-in" transactions. This result obtains since the retailer is excused from remitting the use tax that he collects only to the extent that he remits the retailers' tax with respect to the same transaction. Thus, retailers will be required to pay a tax based on the full value of the article sold, without excluding therefrom the value of any merchandise "traded in." The court ignores the fact that, with respect to the tax increase on these transactions, the tax is not complementary but is entirely new.

The effect of the court's decision seems to be that once a tax is enacted for the general purpose of protecting a prior tax the subsequent tax (1) need not meet constitutional limitations, (2) cannot be constitutionally attacked if it complements similar provisions of the prior act, and (3) can go further than protection and can create an entirely new tax.

While the purpose of the use tax may be desirable, it can be justified only as a tax on a privilege; and it must therefore be uniform as to the class on which it operates. I am convinced that the classifications and exemptions of the Use Tax Act do not comply with the requirement of uniformity (*City of Chicago* v. *Willett Co.*, 1 Ill. 2d 311; *Johnson* v. *Halpin*, 413 Ill. 257; *Winter* v. *Barrett*, 352 Ill. 441) and that it must stand or fall on its own merits. *People ex rel. Schoon* v. *Carpentier*, 2 Ill. 2d 468.

I am mindful of the limitations of our revenue article, and the ever increasing monetary needs of government, but the exigencies of the situation offer no reason for this court to approve this legislation. While, with some mis-

givings, I concede that this is a tax upon a privilege within the meaning of the revenue article, I must dissent from the doctrine that a complementary or protective tax is exempt from the provisions of our basic charter. The court's decision has effectively removed many of the basic constitutional limitations on the taxing power. If this is to be done, it should be by a well considered constitutional amendment and not by fiat of this court.

APPENDIX E.

The Illinois Use Tax Act.

An Act in relation to a tax upon the privilege of using tangible personal property in this State, to make appropriations to the Department of Revenue and to the Secretary of State in connection therewith and to make certain incidental but necessary corrollary changes as an enforcement aid in the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933 as amended, by amending Section 4 of said Uniform Motor Vehicle Anti-Theft Act.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

§1. This Act shall be known and may be cited as the "Use Tax Act".

§2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale or use for demonstration by him of that property in any form as tangible personal property in the regular course of business. "Use" shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property and shall not mean the physical incorporation of tangible personal property, as an ingredient or constituent, into other tangible personal property (a) which is sold in the regular course of business or (b) which the person incorporating such ingredient or constituent therein has undertaken at the time of such purchase to cause to be transported in Interstate Commerce to distinations [destinations] outside the State of Illinois.

"Purchase at retail" means the acquisition of the ownership of, or title to, tangible personal property, through a sale at retail.

"Purchaser" means any person who through a sale at retail acquires the ownership of or title to the tangible personal property that is sold.

"Sale at retail" means any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use, and not for resale, and for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales.

"Selling price" means the consideration paid for a sale valued in money whether received or paid in money or otherwise, including cash, credits, service and property of every kind or nature and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever, but shall not include interest or finance charges which appear as separate items on the bill of sale or sales contract and shall not include charges that are added to prices by sellers on account of the seller's tax liability under the Retailers' Occupation Tax Act, or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by this Act, or on account of the seller's tax liability under the Municipal Retailers' Occupation Tax Act.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

"Retailer" means and includes every person engaged in

the business of selling tangible personal property for use, and not for resale in any form.

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail does not make such person a retailer hereunder; provided that any person who is engaged in a business which is not subject to the tax imposed by the Retailers' Occupation Tax Act because of involving the sale of or a contract to sell real estate or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become real estate, under any provision of a construction contract or real estate sale or real estate sales agreement entered into with some other person arising out of or because of such nontaxable business, shall be considered to be a retailer to the extent of the value of the tangible personal property so transferred. If, in such a transaction, a separate charge is made for the tangible personal property so transferred, the value of such property, for the purposes of this Act, shall be the amount so separately charged, but not less than the cost of such property to the transferor; if no separate charge is made, the value of such property, for the purposes of this Act, shall be the cost to the transferor of such tangible personal property.

"Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business

or agent is located here permanently or temporarily, or temporarily, or whether such retailer or subsidiary is licensed to do business in this State.

§3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Until and including June 30, 1957, such tax is at the rate of 2½% of the selling price of such property; and after June 30, 1957, at the rate of 2% of such selling price.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to the provisions of Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department shall have the power to adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax.

The tax herein imposed shall not apply to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or edu-

cational purposes, when using tangible personal property purchased at retail.

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property which is acquired outside this State and which is moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extend [extent] of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State.

§ 4. Evidence that tangible personal proprty was sold

by any person for delivery to a person residing or engaged in business in this State shall be prima facie evidence that such tangible personal property was sold for use in this State.

§ 5. Every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State (whether such sales are made within or without this State) shall, when collecting the tax as provided in Section 3 of this Act from the purchaser, give to the purchaser (if demanded by the purchase [purchaser]) a receipt therefor in the manner and form prescribed by the Department. Such receipt shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer. Each such retailer shall list with the Department the names and addresses of all his agents operating in this State and the locations of any and all of his distribution or sales houses, offices or other places of business in this State.

§ 6. A retailer maintaining a place of business in this State, if required to register under the Retailers' Occupation Tax Act, need not obtain an additional Certificate of Registration under this Act, but shall be deemed to be sufficiently registered by virtue of his being registered under the Retailers' Occupation Tax Act. Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department (upon a form prescribed and furnished by the Department) for a Certificate of Registration under this Act. In completing such application, the applicant shall furnish such information as the Department may reasonably require. Upon approval of an application for Certificate of Registration, the Department shall issue, without charge, a Certificate of Registration to the applicant. Such Certificate of Registration shall be displayed at the address which the appli-

cant states in his application to be the principal place of business or location from which he will act as a retailer in this State. If the applicant will act as a retailer in this State from other places of business or locations, he shall list the addresses of such additional places of business or locations in this application for Certificate of Registration, and the Department shall issue a Sub-Certificate of Registration to the applicant for each such additional place of business or location. Each Sub-Certificate of Registration shall be conspicuously displayed at the place for which it is issued. Such Sub-Certificate of Registration shall bear the same registration number as that appearing upon the Certificate of Registration to which such Sub-Certificates relate. Where a retailer operates more than one place of business which is subject to registration under this Section and such businesses are substantially different in character or are engaged in under different trade names or are engaged in under other substantially dissimilar circumstances (so that it is more practicable, from an accounting, auditing or bookkeeping standpoint, for such businesses to be separately registered), the Department may require or permit such person to apply for and obtain a separate Certificate of Registration for each such business or for any of such businesses instead of registering such person, as to all such businesses, under a single Certificate of Registration supplemented by related Sub-Certificates of Registration. No Certificate of Registration shall be issued to any person who is in default to the State of Illinois for moneys due hereunder.

The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and pay-

ment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this State, in the same manner and subject to the same requirements, including the furnishing of a receipt to the purchaser (if demanded by the purchaser), as a retailer maintaining a place of business within this State. The receipt given to the purchaser shall be sufficient to relieve him from further liability for the tax to which such receipt may refer. Such permit may be revoked by the Department as provided herein.

§7. It is unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by Section 3 hereof will be assessed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a Claim for Credit under the Retailers' Occupation Tax Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act.

§ 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [by virtue of his being required to pay the tax imposed by the Re]tailers' Occupation Tax Act upon his gross receipts from the same transaction.

§ 9. Each retailer required or authorized to collect the tax herein imposed shall pay to the Department the amount of such tax (except as otherwise provided), on or before the 15th day of the month following the calendar month during which such tax was collected. The first such remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not wait [remit] that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property.

Where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended beyond the close of the month for which the return is filed, the retailer, in collecting the tax (except when such a procedure would make compliance with Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, impossible or impracticable), may collect, for each month, only the tax applicable to that part of the selling price actually received during such month.

On or before the 15th day of each month, such retailer shall also file a return for the preceding calendar month, the first such return being due by September 15, 1955, covering the preceding calendar month.

Where a retailer collects the tax with respect to the selling price of tangible personal property which he sells and the purchaser thereafter returns such tangible personal property and the retailer refunds the selling price thereof to the purchaser, such retailer shall also refunds, to the purchaser, the tax no [so] collected from the purchaser. When filing his return for the month in which he refunds such tax to the purchaser, the retailer may

deduct the amount of the tax so refunded by him to the purchaser from any other use tax which such retailer may be required to pay or remit to the Department, as shown by such return, provided that the amount of the tax to be deducted shall previously have been remitted to the Department by such retailer. If the retailer shall not previously have remitted the amount of such tax to the Department, he shall be entitled to no deduction hereunder upon refunding such tax to the purchaser.

Any retailer filing a return hereunder shall also include (for the purpose of paying tax thereon) the total tax covered by such return upon the selling price of tangible personal property purchased by him at retail from a retailer, but as to which the tax imposed herein was not collected from the retailer filing such return, and such retailer shall remit the amount of such tax to the Department when filing such return.

If experience indicates such action to be practicable, the Department may prescribe and furnish a combination or joint return which will enable retailers, who are required to file returns hereunder and also under the Retailers' Occupation Tax Act, to furnish all the return information required by both Acts on the one form.

Where the retailer has more than one business registered with the Department under separate registration hereunder, such retailer shall not file each return that is due as a single return covering all such registered businesses, but shall file separate returns monthly for each such registered business.

In his return, the retailer shall determine the value of any consideration other than money received by him in connection with the sale of any tangible personal property in the course of his business and he shall include such value in his return. Such determination shall be subject to review and revision by the Department in the

manner hereinafter provided for the correction of returns.

All moneys received by the Department hereunder shall be paid into the General Revenue Fund of the State Treasury.

§ 10. When tangible personal property is purchased from a retailer for use in this State by a purchaser who did not pay the tax herein imposed to the retailer, and who does not file returns with the Department as a retailer under Section 9 of this Act, such purchaser (by the 15th day of the month following the calendar month in which such purchaser makes any payment upon the selling price of such property) shall file a return with the Department and pay the tax due upon that portion of the selling price so paid by the purchaser during the preceding calendar month. Such return and payment from the purchaser shall be submitted to the Department sooner than the 15th of the month after the month in which the purchase is made to the extent that that may be necessary in order to secure the title to a motor vehicle under Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended. To the extent to which they may be pertinent, all of the provisions of Section 9 with reference to returns and payments shall be applicable to the returns and payments herein required. When a purchaser pays a tax herein imposed directly to the Department, the Department (upon request therefor from such purchaser) shall issue an appropriate receipt to such purchaser showing that he has paid such tax to the Department. Such receipt shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer.

§ 11. Every retailer required or authorized to collect taxes hereunder and every person using in this State tangible personal property purchased at retail from a retailer on or after the effective date hereof shall keep

such records, receipts, invoices and other pertinent books, documents, memoranda and papers as the Department shall require, in such form as the Department shall require. For the purpose of administering and enforcing the provisions hereof, the Department, or any officer or employee of the Department designated, in writing, by the Director thereof, may hold investigations and hearings concerning any matters covered herein and may examine any books, papers, records, documents or memoranda of any retailer or purchaser bearing upon the sales or purchases of tangible personal property, the privilege of using which is taxed hereunder, and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of the facts, and may take testimony and require proof for its information.

§ 12. All of the provisions of Sections 2b, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c (with the authority contained therein for the releasing of liens against retailers being applicable to the same extent and on the same conditions in this Act to the releasing of liens against users as well as to the releasing of liens against retailers), 5d, 5e, 5f (with the provision contained therein concerning the inclusion of the name of the "retailer" in a published notice and the provision contained therein requiring notice by registered mail to the "retailer" being applicable in this Act also to a user where the property to which the lien applies belongs to a user), 5g, 7, 8, 9, 10, 11, 12 and 12½ in effect on the effective date of this Act, as subsequently amended,

which are not inconsistent with this Act, shall apply, as far as practicable to the subject matter of this Act to the same extent as if such provisions were included herein.

§ 13. Whenever any retailer not maintaining a place of business in this State, to whom a permit to collect the tax hereby imposed has been issued pursuant to Section 6 hereof, fails to comply with any of the provisions hereof or any orders, rules or regulations of the Department prescribed and adopted hereunder, or when the Department considers the security furnished by such retailer to be inadequate or considers that the tax can be collected more effectively from persons using such property in this State, the Department may, upon notice and hearing as herein provided, by order revoke the permit issued to such retailer. No order authorized by this Section shall be made until the retailer is given an opportunity to be heard and to show cause why such order shall not be made, and he shall be given at least 7 days' notice of the time, place and purpose of such hearing. The Department shall have the power in its discretion to issue a new permit pursuant to Section 6 hereof after such revocation.

§ 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provision of Section 9 or Section [10] hereof, or who fails to keep books and records as required herein, or who files a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in the county jail for not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

Any person who violates any provision of Section 6 hereof is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00 or be imprisoned in the county jail not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in the business in violation of said Section 6 shall constitute a separate offense.

This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the Retailers' Occupation Tax Act.

§ 15. The tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof.

§ 16. The sum of $500,000, or so much thereof as may be necessary, is appropriated to the Depatment of Revenue for the ordinary and contingent expenses of said Department in administering the provisions of this Act. The amounts expended from said appropriation for personal services shall be available only for compensation of positions classified under "An Act to standardize State position titles and salary rates," approved June 30, 1943, as amended. No contract shall be entered into or obligation incurred for any expenditure for contingencies from the appropriation herein made until after the purpose and amount of such expenditure has been approved in writing by the Governor. All printing and postage purchased from the above appropriation shall be secured through the Department of Finance, and all stamps shall be perforated for identification purposes by the Department of Finance before delivery to the Department of Revenue. The appropriation herein made is subject to the provisions of "An Act in relation to State finance," approved June 10, 1919, as amended. Not more than seventy-five per cent (75%)

of the appropriation made in this Section shall be expended or encumbered from the date that this Act becomes effective to the first day of January of the year in which the next regular session of the General Assembly shall convene. Provided, that this limitation shall not apply to the appropriation made in this Section when used for the following objects and purposes: Equipment, contractual services, commodities, contingencies, stationery and printing and office supplies.

§17. The sum of $100,000, or so much thereof as may be necessary, is appropriated to the Secretary of State for the performance of his duties in relation to this Act under Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended. The appropriation made in this Section is subject to the provisions of "An Act in relation to State finance", approved June 10, 1919, as amended.

§ 18. If any clause, sentence, Section, provision or part of this Act or the application thereof to any person or circumstance shall be adjudged to be unconstitutional, the remainder of this Act or its application to persons or circumstances other than those to which it is held invalid, shall not be affected thereby. In particular, if any provision which exempts or has the effect of exempting some class of users or some kind of use from the tax imposed by this Act should be held to constitute or to result in an invalid classification or to be unconstitutional for some other reason, such provision shall be deemed to be severable, with the remainder of this Act without said provision being held constitutional.

§ 2. Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, is amended to read as follows:

§ 4. (a) The application for a certificate of title properly sworn to, shall be made upon the appropriate form furnished or approved by the Secretary of State and shall

contain a full description of the motor vehicle including the trade name or the name of the maker, the engine and serial numbers of the vehicle identification number in lieu of the engine and serial numbers and any distinguishing marks thereon and whether the motor vehicle is new or used, together with a statement of the applicant's title and whether possession is held by right of title, lease, conditional sale, mortgage or other agreement, and of any interest in or lien or encumbrances upon said motor vehicle and the name and address of the person holding such interest, lien or encumbrance and the name and address of the person to whom the certificate of title shall be delivered and such other information as the Secretary of State may require, and every application shall be accompanied by a fee of 50¢, which shall be in addition to any fee charged for the registration of such motor vehicle.

An application for a certificate of title for a new motor vehicle shall be accompanied by the certificate prescribed in Section 3a.

An application for a certificate of title for any motor vehicle must be accompanied by proof either that no tax imposed pursuant to the "Use Tax Act" is owing by reason of the use of such motor vehicle in Illinois or that any tax so imposed has been paid. A receipt issued pursuant to such Act shall be proof of payment of such tax. In the absence of proof of payment or of non-liability, no certificate of title shall be issued to such applicant.

(b). Whenever application is made for a certificate of title for a motor vehicle for which a certificate of title has not previously been issued in this State, such application shall include a bill of sale or statement of transfer by the seller and of any lien retained by such seller. The sale or transfer of a motor vehicle for which a certificate of title has previously been issued in this State, or the sale or transfer of a new or used motor vehicle by a dealer duly

registered with the Secretary of State as required by the laws of this State and duly enfranchised by a manufacturer of motor vehicles or by an authorized distributor of such manufacturer, or the sale or transfer of a used motor vehicle by a dealer duly licensed as provided in this Act, shall, in each such case, be *prima facie* evidence to the Secretary of State that the purchaser or transferee is the owner of such vehicle and legally entitled to make application for a certificate of title therefor; provided, that if the Secretary of State, from examination of the application for a certificate of title for any such vehicle, or by other evidence available to him, is of the opinion that such applicant is not the owner of the vehicle, he shall not issue a certificate of title therefor but shall cause a thorough investigation to be made of the source and antecedents of such title and the right of such applicant to a certificate of title. Where application is made for a certificate of title for a new or used motor vehicle not previously titled in this State and not sold or transferred under any of the above enumerated conditions establishing a *prima facie* case of ownership in the purchaser or transferee, the Secretary of State shall not issue a certificate of title therefor, but shall cause a thorough investigation to be made of the source and antecedents of such title and the right of such applicant to a certificate of title.

If, as a result of any investigation of title herein authorized, the Secretary of State is satisfied as to the validity of the title and ownership of the applicant, and that such applicant does not owe any tax imposed by the Use Tax Act, he shall issue a certificate of title in accordance with the terms of this Act. The Secretary of State, in his discretion, may combine the application for a certificate of title with the application for the certificate of registration.

Passed in General Assembly June 28, 1955.

Approved July 14, 1955. (Ill. Rev. Stat. Vol. 2, p. 823.)